No. 90-631

In The
Supreme Court of the United States
October Term, 1990

CRANFORD INSURANCE COMPANY, now known as AMERICAN SPECIAL RISK INSURANCE COMPANY, a Delaware Corporation; SPHERE INSURANCE COMPANY, LTD., now known as SPHERE DRAKE INSURANCE, PLC, a British Corporation; INTERNATIONAL INSURANCE COMPANY, an Illinois Corporation,
Petitioners,

v.

ROHM & HAAS COMPANY; SOUTH MACOMB DISPOSAL AUTHORITY; WASTE MANAGEMENT, INC.; CHEMICAL WASTE MANAGEMENT, INC.; GENERATORS OF WASTE AT THE ENVIRONMENTAL CONSERVATION AND CHEMICAL CORPORATION SITE, in Zionsville, Indiana,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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January 4, 1991

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

Petitioners make the following reply to the Response filed in the above matter to their Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.[1]

[1] Pursuant to Sup.Ct.R. 29.1, Petitioners provided a list of parents and subsidiaries in their Petition for Writ of Certiorari (Petition) at ii. The list remains unchanged.

I. PROTECTIVE ORDER MODIFICATION

A. This Conflict Is Not Fact Dependent

Respondents argue that the Circuit Courts of Appeal are not truly in conflict as to the standard by which a court may modify protective orders in dismissed cases in order to grant a non-party access to discovery materials. However, the Tenth Circuit Court of Appeals found that such a conflict existed, and elected in this case to adopt the rule fashioned by the Seventh and Ninth Circuits. *See* Petition 6a–7a. One federal judge described this area of the law as being in a state of "chaos". *H.L. Hayden Co. of N.Y.* v. *Siemens Med. Systems*, 106 F.R.D. 551, 552 (S.D.N.Y. 1985).[2]

The Second Circuit Court of Appeals, in *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), and the Eighth Circuit in *Iowa Beef Processors, Inc.* v. *Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied sub nom. Iowa Beef Processors, Inc.* v. *Smith*, 441 U.S. 907 (1979), have presumed the continued integrity of protective orders and have placed a "burden of persuasion" upon the movants, requiring them to first demonstrate a compelling need or extraordinary circumstance before the Court would balance the interests of continued protection against those interests supporting disclosure. The Circuit Courts of Appeals for the Seventh Circuit and the Ninth Circuit have created a presumption in favor of disclosure, and have placed the burden of persuasion upon the parties opposing modification of the protective order to demonstrate tangible prejudice to their substantial rights. *Wilk* v. *American Medical Ass'n*, 635 F.2d 1295 (7th Cir. 1980); *Olympic Refining Co.* v. *Carter*, 332

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[2] Other commentators have observed a conflict among the Circuits on this issue, and have called for, or suggested, the adoption of a uniform rule governing practice in this area. *See, e.g.*, Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 43 & nn. 181 & 182 (1983); Sherman & Kinnard, *Federal Court Discovery in the 80's — Making the Rules Work*, 95 F.R.D. 245, 286 n. 182 (1982); Annot., 85 A.L.R. Fed. 538 (1987).

F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964). Respondents grossly oversimplify this real conflict when they assert that the decisions in *Martindell* and *Iowa Beef* turned on the governmental status of the intervenor, and that in all cases the Courts were merely applying the Fed.R.Civ.P. 26(c) "good cause" requirement to the facts before them. The governmental status of the intervenors in *Martindell* and *Iowa Beef* was merely one factor tending to diminish the "compelling need" for modification of a protective order. The same standard was applied to private sector intervenors by the Second Circuit in *FDIC* v. *Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982), and by the court in *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co., Ltd.*, 529 F. Supp. 866 (E.D.Pa. 1981).

This case provides this Court with a particularly appropriate opportunity to resolve this conflict, precisely because it arises out of such a clear and commonplace factual context. The intervenors do not have governmental or media status. There are no other singular factual circumstances which might narrow the scope of a definitive ruling on the issues raised by Petitioners.

B. Non-Parties Have No Public Right Of Access To Discovery Materials

It is misleading for Respondents to invoke the "time-honored tradition that civil discovery take place in the public eye". Response at 7. Most civil discovery does not take place in public, and never has. In *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), this Court recognized this fact, and approved the adoption of local court rules and protective orders to restrict or control public access to discovery materials. The reliance on a contrary conception of a public right to discovery materials which underlies the Ninth Circuit's 1964 Opinion in *Olympic Refining* and other authorities cited by Respondents provides further reason for this Court to address the standards for modifying protective orders for the benefit of non-parties.

C. Policies Favoring "Shared Discovery" Do Not Apply To This Case

Respondents appeal to the favored concept of "shared discovery" and argue that Petitioners improperly seek to prevent use of information in collateral litigation.[3] "Shared discovery" typically refers to the exchange of technical information by a large number of plaintiffs litigating common factual issues in product liability cases against one or more manufacturers with disproportionately greater resources. These defendants are usually "prejudiced" by "shared discovery" only to the extent that it augments the resources of the various plaintiffs. It takes place in active litigation, under the supervision of judges aware of the issues posed by the individual cases. These factors have no relevance to this case, where a protective order was modified by a judge unfamiliar with Respondents' various lawsuits, so as to provide Respondents unfettered access to documents produced in reliance on that order, in a case which had been settled and dismissed for almost three years.[4]

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[3] It is unfair to so mischaracterize Petitioners' objection to the wholesale release of materials once produced under the protective order entered in *United Nuclear Corp.* v. *Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990). Petitioners have consistently recognized that many of those same materials, to the extent they are unprivileged and relevant to Respondents' lawsuits, could be discovered in those suits. This procedure would preserve Petitioners' right and ability to raise the issues of relevancy and privilege in each case — a concern rarely present in the typical "shared discovery" setting.

[4] Respondents' suggestion that the issues raised by Petitioners are moot is baseless. Respondents indicate only that "[b]ecause the resolution of this type of discovery dispute is fact dependent and subject to the trial court's discretion in each case, the 'capable of repetition yet evading review' exception permitting review of moot questions does not justify review in this case." Response at 4 n. 2. Respondents' sole authority for this point is *DeFunis* v. *Odegaard*, 416 U.S. 312, 319–20 n. 5 (1974). However, nothing in *DeFunis* even remotely suggests that application of the "capable of repetition yet evading review" exception to the mootness doctrine turns upon whether the challenged decision was fact dependent or discretionary. Not surprisingly, the focus on this issue in *DeFunis* instead

The court in *Zenith Radio Corp.* recognized that "there is a qualitative difference between sustaining the confidentiality of a single document at the time of its designation and sustaining the confidentiality of hundreds of thousands of documents en masse years after they have been produced and given a confidentiality designation" 529 F. Supp. at 893. Thus it is appropriate to place a threshold burden upon the party seeking disclosure in such cases. It is unfair, impractical and illogical to review cases such as this by the standards applied to "shared discovery" or other initial motions for protective orders covering a limited and well-defined class of materials or information.

II. JURISDICTION

Respondents first argue that this Court's decisions in *Owen Equipment Co. & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978), and *Finley* v. *United States*, 490 U.S. 545 (1989), concerning the limits of diversity jurisdiction are inapplicable because neither involved a "permissive intervenor making a limited discovery request but not seeking to assert a claim or defense in the action." Response at 16. Respondents' attempt to distinguish *Kroger* and *Finley* misses the point. Those cases and this case all involve situations where a court is asked to take

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was upon whether the question presented was "'capable of repetition' so far as [the petitioner was] concerned", and whether it would "in the future evade review." 416 U.S. at 319. And indeed, contrary to Respondents' cursory suggestion, the "capable of repetition yet evading review" exception to the mootness doctrine does in fact apply even to the review of questions arising from discretionary, fact-dependent decisions. *See Reid* v. *I.N.S.*, 766 F.2d 113, 114 (3d Cir. 1985); *United States* v. *Peters*, 754 F.2d 753, 757–58 (7th Cir. 1985); *United States* v. *Edwards*, 672 F.2d 1289, 1291–92 (7th Cir. 1982); *Quintana* v. *Califano*, 623 F.2d 128, 129–30 (10th Cir. 1979); *Golden Holiday Tours* v. *Civil Aeronautics Board*, 531 F.2d 624, 626 (D.C. Cir. 1976). *Cf. also Press-Enterprise Co.* v. *Superior Court of California for Riverside County*, 478 U.S. 1, 6 (1986); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 165 n. 6 (1977); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546–48 (1976); *In Re Reporters Comm. For Freedom of the Press*, 773 F.2d 1325, 1328–29 (D.C. Cir. 1985).

jurisdiction of a party for whom no independent basis of jurisdiction exists. Nowhere did this Court in *Kroger* or *Finley* limit its discussions to the situation described by Respondents. Further, despite Respondents' statement that they were "not seeking to assert a claim or defense in the action", they cannot dispute that their role in the action is an offensive one; a role that this Court has expressly stated is not the typical situation to which ancillary jurisdiction applies. *Kroger*, 437 U.S. at 376.

Respondents next assert that a lack of an independent jurisdictional basis is not fatal where an intervenor does not seek involvement in the merits of the underlying suit but, rather, only seeks access to discovery. Respondents provide no authority for such a distinction. Neither Fed.R.Civ.P. 24 nor case law make such distinctions. *See, Int'l Paper Co.* v. *Inhabitants of the Town of Jay, Me.*, 887 F.2d 338, 346–47 (1st Cir. 1989) (rejecting intervenor's argument "that since it is seeking 'simply to make it views known concerning a statute' rather than to assert a claim, it does not make sense to require it to establish an independent ground for jurisdiction.") Further, Respondents' citation to the Tenth Circuit's statement that "the most important circumstance in this case is that intervention was not on the merits, but for the sole purpose of challenging a protective order", Response at 16, quoting 905 F.2d at 1427, is a gross misrepresentation of that Court's decision. The Tenth Circuit made that observation in the context of addressing the argument on the timeliness of the intervention request, not in the context of determining jurisdiction.

Indeed, Respondents' involvement in the underlying action only for the purpose of seeking access to discovery points out the inappropriateness of extending the doctrine of ancillary jurisdiction to the request. The concept of ancillary jurisdiction is based on the needs "to protect legal rights or effectively to resolve an entire, logically entwined lawsuit." *Kroger*, 437 U.S. at 377. Seeking access to discovery — Respondents' alleged purpose for intervention — does not

invoke either of those needs. They have never claimed that intervention was necessary to protect any legal right, nor could they legitimately do so in view of the fact that they could accomplish the same result by pursuing discovery in their pending cases. Similarly, they do not argue that intervention is necessary to resolve an entire, logically entwined lawsuit. Here again, they could not do so in view of the fact that the main action has been dismissed for several years.

Respondents' citation of *Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458 (1980), is nothing more than an attempt to divert attention from the undisputed fact that no independent basis of jurisdiction exists. In *Navarro*, the plaintiffs were eight individual trustees of a business trust suing in their own names. The defendant argued that the trust beneficiaries, not the plaintiff trustees, were the real parties to the case whose citizenship controlled for purposes of determining diversity. This is an entirely different — and wholly irrelevant — question from that of whether a permissive intervenor must have an independent basis of jurisdiction.

Further, although Respondents now disclaim party status[5] in an attempt to argue that their citizenship is irrelevant for purposes of the court's diversity jurisdiction, by seeking intervention Respondents became parties to the action. *See generally* 7C, C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1920 (2d ed. 1986) ("the intervenor is treated as if he were an original party and has equal standing with the original parties"); *Int'l Paper Co.*, 887 F.2d at 347. Indeed, Respondents so argued below:

> "... Intervenors are parties to this litigation. Once the trial court granted the motion to intervene, Intervenors became full participant[s] in the lawsuit and [were] treated just as if [they] were ... original part[ies]." 25 a.

[5] To accept Respondents' argument that they are not real parties would appear to result in a situation where the proceedings are pursued by no one, for the present proceedings were brought solely by Respondents.

As parties, Respondents' citizenship cannot be ignored.

Finally, Respondents' reliance on *Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U.S. 48 (1922), is misplaced. *Wichita* was decided before enactment of Fed.R.Civ.P. 24 and involved a situation more analogous to intervention of right under the present rules than to permissive intervention under Rule 24.[6] Further, this Court's post-*Wichita* decisions in *Hoffman* v. *McClelland*, 264 U.S. 552 (1924) (affirming district court's finding of no jurisdiction of intervenors' claim where independent jurisdictional grounds were lacking), and *Fulton National Bank of Atlanta* v. *Hozier*, 267 U.S. 276 (1925) (disallowing intervention by drawer of check in receivership of his payee in absence of independent jurisdictional grounds), suggest that *Wichita* does not have the sweeping effect asserted by Respondents.

Respondents do not dispute that they lack an independent basis of federal jurisdiction on which to base the action. Their attempt to argue that since they are purportedly seeking involvement in the underlying action only to pursue discovery, the lack of jurisdiction is not fatal despite the general rule that a permissive intervenor must show an independent basis of jurisdiction is unsupported by authority. The Petition for Writ of Certiorari should be granted to clarify the limits of federal jurisdiction over permissive intervenors.

III. RULE 24 REQUIREMENTS

Contrary to Respondents' oversimplified opposition, Petitioners' third issue encompasses significantly more than a mere "technical" application of a "meaningless" pleading requirement of Rule 24(c). Response at 18. Rule 24(c)'s pleading requirement is clearly intended to facilitate evaluation of, and compliance with, Rule 24(b)(2)'s require-

[6] The Wichita Company sought to prohibit the defendant Commission from raising the rates charged by a Kansas company for electricity sold to the Wichita company. The Kansas company was allowed to intervene in support of the Commission's order.

ment that "the applicant's claim or defense and the main action have a question of law or fact in common." Notwithstanding any interests served by liberal construction, permissive intervention under Rule 24(b)(2) clearly remains inappropriate when the applicant fails to advance an interest sufficient to support a legal claim or defense common to the main action. *See Diamond* v. *Charles*, 476 U.S. 54, 76–77 (1986) (O'Connor, J., concurring); *Shevlin* v. *Schewe*, 809 F.2d 447, 449–50 (7th Cir. 1987); *California* v. *Tahoe Regional Planning Agency*, 792 F.2d 779, 781–82 (9th Cir. 1986); *Wade* v. *Goldschmidt*, 673 F.2d 182, 185–87 (7th Cir. 1982); *Howse* v. *S/V "Canada Goose I"*, 641 F.2d 317, 321–23 (5th Cir. 1981); *Dickerson* v. *U.S. Steel Corp.*, 582 F.2d 827, 831–34 (3d Cir. 1978); *Dowdy* v. *Hawfield*, 189 F.2d 637, 638–39 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951). *See also* 7C, C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1911 (2d ed. 1986).

The authority overlooking Rule 24(c)'s pleading requirement generally concerns a situation where the applicant in fact had an interest sufficient to support a claim or defense as contemplated by Rule 24(b)(2), but merely failed to properly plead it. *See Shevlin*, 809 F.2d at 449–50; *Farina* v. *Mission Investment Trust*, 615 F.2d 1068, 1074–75 (5th Cir. 1980); *Spring Construction Co., Inc.* v. *Harris*, 614 F.2d 374, 377 (4th Cir. 1980); *WJA Realty Ltd. Partnership* v. *Nelson*, 708 F. Supp. 1268, 1272 (S.D.Fla. 1989); *Yankee Bank for Finance & Savings, FSB* v. *Hanover Square Associates-One Limited Partnership*, 693 F. Supp. 1400, 1409–10 (N.D.N.Y. 1988); *Belgin American Mercantile Corp.* v. *De Grove-Marcotte & Fils*, 433 F. Supp. 1098, 1101 (S.D.N.Y. 1977); *Alexander* v. *Hall*, 64 F.R.D. 152, 156–59 (D.S.C. 1974); *Benner* v. *Philadelphia Musical Soc., Local 77, of Am. Federation of Musicians*, 32 F.R.D. 197, 199 (E.D.Pa. 1963); 3B, J. Moore & J. Kennedy, *Moore's Federal Practice*, ¶ 24.14 & nn. 3 & 4 (2d ed. 1990). When the applicant can otherwise advance such an interest, some courts overlook Rule 24(c)'s pleading requirement as an unnecessary formality.

In the protective-order modification context here, however, the Tenth Circuit and a few others have effectively disregarded Rule 24 in its entirety. What is then characterized as permissive "intervention" under Rule 24(b)(2) has absolutely none of the necessary characteristics. In the Tenth Circuit's view, proposed "intervenors" such as Respondents need not file a pleading, or even incorporate a pleading by reference; they need not be a party; they need not even have a claim or defense with factual or legal questions common to the main action. In the Tenth Circuit, the main action also may even have been dismissed as to all parties years before, and the Judge in the main action then encounters only issues raised by non-parties concerning discovery in an action over which the court has no jurisdiction.

This situation readily demonstrates that Rule 24 is neither intended nor appropriate for accommodating non-party participation in a closed case for the sole purpose of obtaining discovery in an unrelated action. The invariable result in this context is sham intervention and the needless expenditure of judicial resources. As Petitioners explained in their Petition for A Writ of Certiorari, clarification in this area therefore is indeed appropriate.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Tenth Circuit entered on June 15, 1990.

Respectfully submitted,

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January 4, 1991

INDEX TO APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED NUCLEAR CORPORATION,
Plaintiff-Appelles,

v. No. 89-2205

CRANFORD INSURANCE COMPANY, now known as AMERICAN SPECIAL RISK INSURANCE COMPANY, a Delaware Corporation, SPHERE INSURANCE COMPANY, LTD., now known as SPHERE DRAKE INSURANCE, PLC, a British Corporation, INTERNATIONAL INSURANCE COMPANY, an Illinois Corporation,
Defendants-Appellants,

and

NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, formerly known as NORTHBROOK INSURANCE COMPANY, an Illinois Corporation,
Defendants,

ROHM AND HAAS COMPANY, SOUTH MACOMB DISPOSAL AUTHORITY, WASTE MANAGEMENT, INC., CHEMICAL WASTE MANAGEMENT, INC., GENERATORS OF WASTE AT THE ENVIRONMENTAL CONSERVATION AND CHEMICAL CORPORATION SITE, in Zionsville, Indiana,
Intervenors-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

HONORABLE E.L. MECHEM
DISTRICT JUDGE

INTERVENORS-APPELLEES' RESPONSE BRIEF

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LIST OF PRIOR OR RELATED APPEALS

Pursuant to Rule 28.2(a) of the Rules of the United States Courts of Appeals for the Tenth Circuit, Intervenors-Appellees certify that there are no prior or related appeals.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court lacks jurisdiction over an appeal from a non-final discovery order allowing intervention and discovery sharing, particularly in light of on-going discovery proceedings in the trial court.

2. Whether the trial court's decision to allow intervention based on findings of timeliness, no prejudice to defendants, and Intervenors' interest in shared discovery was neither clearly erroneous nor an abuse of discretion.

3. Whether the trial court properly exercised its discretion in ruling that the Intervenors had standing to seek a modification of the protective order in order to engage in discovery sharing and based on expressed willingness to be bound by the modified protective order.

4. Whether the trial court properly exercised its discretion in allowing intervention and modification of the protective order upon findings of good cause for such a modification and that the discovery ordered would not affect defendants' rights under the protective order or the settlement agreement.

I.

STATEMENT OF RELEVANT FACTS

A. The UNC Litigation

1. In 1985, United Nuclear Corporation ("UNC") filed a declaratory judgment action, urging the court that Cranford Insurance Company (n/k/a/ American Special Risk Insurance Company) ("ASRIC") and International Insurance Company ("International"), (collectively, "Appellants") were liable to UNC under environmental impairment liability ("EIL") insurance policies. Docket Number ("Doc.") 31 at 3–4. Appellants removed this action to the United States District Court for the District of New Mexico on June 20, 1985. Doc. 1.

2. The parties exchanged discovery requests and took depositions. *See, e.g.*, Doc. 47, 56,60, 63, 139–45. During the course of discovery, the trial court entered two protective orders. On February 19, 1986, the court entered a protective order that deemed all documents produced in discovery to be confidential and limited access to the documents to a small group of people. Doc. 66. The court amended the protective order on May 10, 1986 to, *inter alia*, extend the protective order to certain named non-parties. Doc. 90.

3. The *UNC* matter settled on August 18, 1986. Doc. 137. At that time, the court ordered that the court file be sealed and that depositions and exhibits not be disclosed to anyone. Doc. 136.

B. The Intervenors' Litigation

4. On November 8, 1983, numerous generators of waste that was transported to the Environmental Conservation and Chemical Corporation ("Enviro-Chem") site in Zionsville, Indiana, Intervenors-appellees Enviro-Chem generators, filed a third-party complaint against Appellants in the United States District Court for the Southern District of Indiana. Doc. 143 at 4 and exhibit G. The third-party plaintiffs are insured

under two EIL policies issued to Enviro-Chem by Appellants. *Id.* Appellants have denied coverage for Superfund clean-up liabilities, based upon various policy provisions. *Id.* The meaning of the EIL policies will be the key issue in the litigation. *Id.*

5. On October 5, 1987, Intervenors-appellees Waste Management, Inc. and Chemical Waste Management, Inc. filed an action in the Circuit Court of Cook County, Illinois against ASRIC and another EIL insurer to recover EIL insurance proceeds for three underlying actions. Doc. 143 at 5 and exhibit G. Later that day, International and ASRIC filed suit in the same court against Intervenors-appellees Waste Management, Inc., Chemical Waste Management, Inc. and SCA Services, Inc. (collectively, "WMI"), which, as later amended, seeks a declaration of non-coverage for the three lawsuits and two additional sites. *Id.* The litigants contest, among other things, the meaning of certain policy terms. *Id.*

6. On December 1, 1987, Intervenor-appellee Rohm and Haas Company filed an action in the Superior Court of New Jersey against, among others, International for a declaratory judgment of EIL insurance coverage for ten underlying sites that have been the subject of litigation, administrative actions and clean-ups. Doc. 143 at 7 and exhibit G. At issue in the litigation is the interpretation of three EIL policies issued by International. *Id.*

7. On August 6, 1984, Intervenor-appellee South Macomb Disposal Authority ("SMDA") filed a declaratory judgment against three EIL carriers, including International and ASRIC, in Circuit Court of Macomb County, Michigan seeking coverage for a number of claims made against it with respect to its operation of two former landfills in Macomb County. Doc. 143 at 8 and exhibit G.

C. The Intervention

8. On May 2, 1989, the Enviro-Chem generators, WMI, Rohm and Haas Company and SMDA (collectively, "Intervenors")

moved to intervene in the *UNC* litigation for the sole purpose of modifying the protective orders and obtaining access to the court file, depositions, and documents produced during discovery by the Appellants. Doc. 142. Intervenors expressly disclaimed interest in any documents regarding UNC's claims against their comprehensive general liability insurance carriers or about the underlying hazardous waste lawsuits. *Id.* at 2. Intervenors also expressly agreed to be bound by the amended protective order and to use the newly gained information only for the purposes of their own lawsuits. *Id.*; *see also* Doc. 158 at 2–3.

9. On August 14, 1989, the trial court granted the motion to intervene. Doc. 158 at 5. The court made the express factual finding "that the interpretation of EIL policies issued by or through defendants Cranford/ASRIC and International, which was the subject of the UNC case, is common to the movants' pending litigation. Information obtained through discovery in the UNC case is therefore relevant to the movants' present litigation." *Id.* at 4. The court also expressly held that "[Appellants] would be obligated to duplicate and produce [relevant information from the *UNC* file] in the pending lawsuits." *Id.* at 5.

10. The court further granted the motion to unseal the court file and modify the protective order and allowed Intervenors to use the information solely for the purpose of litigating their current lawsuits. Doc. 158 at 5–6. The court's ruling expressly held Intervenors to "be otherwise fully bound by the terms of the existing protective order." *Id.* at 6.

11. The Intervenors served a deposition subpoena on Richard Mackenzie, counsel for UNC. Doc. 159. The Appellants filed a motion to quash the subpoena, which the court denied. Doc. 160 and 163. The court further denied the Appellants' motion for a stay of the subpoena pending appeal. *See* Doc. 166. The Appellants applied to this Court for an emergency stay of the subpoena pending appeal, which this Court denied by Order of September 14, 1989.

12. The deposition proceeded on September 7 and 8, 1989; Appellants produced some of the documents but withheld most of them. Brief in Chief at 15. The withheld documents are the subject of a pending motion to compel. Doc. 168.

II.

ARGUMENT

POINT I. THIS COURT LACKS JURISDICTION OVER THIS APPEAL FROM A NON-FINAL DISCOVERY ORDER ALLOWING INTERVENTION AND DISCOVERY SHARING, PARTICULARLY IN LIGHT OF ONGOING DISCOVERY PROCEEDINGS IN THE TRIAL COURT.

A. Applicable Standard of Review.

This Court must satisfy itself that jurisdiction is proper in every case, thus, jurisdiction is a question for the appellate court to decide. *See Delgado Oil Co. v. Torres*, 785 F.2d 857, 859 (10th Cir. 1986).

B. This Court Lacks Jurisdiction Over an Appeal From a Non-Final Discovery Order, Particularly in Light of Ongoing Discovery Proceedings in the Trial Court.

As Appellants concede, discovery orders are interlocutory and non-appealable. Brief in Chief at 5. The order granting the intervention and modification of the protective order is a simple discovery order. The facts that discovery was served (Doc. 159) and a motion to compel was filed (Doc. 168) after the trial court granted the motion to intervene and modify the protective order best indicate that this order is not ripe for appeal.

Interlocutory relief on appeal from discovery orders is unavailable absent extraordinary circumstances not present here. *See, e.g.*, Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 342 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Paramount Film Dist. Corp. v. Civic Center Theater*, 333 F.2d 358, 361–62 (10th Cir. 1964). Production of documents by order of the trial court does not constitute irreparable harm that would invoke the collateral order doctrine allowing interlocutory appeal. *Id.*; *Dillie v. Carter Oil Co.*, 174 F.2d 318 (10th Cir. 1949) (*per curiam*). Where this Court rejected interlocutory relief based on a claim that compliance with discovery ordered by the court below might violate the laws of a foreign country, *Finesilver*, 546 F.2d at 342, Appellants' claims afford them no greater entitlement to what is essentially interlocutory relief.

Moreover, as Appellants correctly note, a final judgment is an "order that ends the litigation." Brief in Chief at 5, quoting, 6 *Moore's Federal Practice*, paragraph 54.02 (1988). They are incorrect, however, that this litigation has ended. In fact, Intervenors filed a deposition subpena duces tecum after the intervention was granted. Doc. 159. When Appellants refused to allow production of documents during that deposition, Intervenors moved to compel production of the documents. Doc. 168. Intervenors' motion to compel remains pending.

Such ongoing discovery proceedings in the trial court following entry of the order granting intervention and discovery require a ruling that the orders appealed from is not a final order and that this Court lacks jurisdiction over this appeal. This appeal should be dismissed for lack of jurisdiction.

POINT II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING INTERVENTION

A. Applicable Standard of Review.

This Court has consistently held that permissive intervention under Federal Rule of Civil Procedure 24(b) is clearly discretionary with the trial court. *Shump v. Balka*, 574 F.2d 1341, 1345 (10th Cir. 1978) (collecting cases). This Court will not reverse a trial court's ruling on intervention unless the opposing party proves a clear abuse of discretion. *Id.*

B. Federal Law Recognizes the Value of Sharing Discovery.

The Federal Rules of Civil Procedure encourage mechanisms that will expedite discovery. In fact, the vast majority of courts, including this Court, have consistently recognized the value of some type of shared discovery[1] to effectuate the admonition of the Rules for speedy and inexpensive litigation.

Federal Rule of Civil Procedure 1 states that the rules shall "be construed to secure the just, speedy and inexpensive determination of every action." The Seventh Circuit, for example, has specifically relied on Rule 1 to grant relief

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[1] Opinions from across the country support the trial court's decision to allow intervention and modification of the protective order. *See FTC. v. Standard Financial Management Co.*, 830 F.2d 404 (1st Cir. 1987); *United States v. GAF Corp.*, 596 F.2d 10 (2nd Cir. 1979); *Cipollone v. Liggett Group, Inc.*, 882 F.2d 335 (3d Cir. 1987); *Superior Oil Co. v. American Petrofina Co.*, 785 F.2d 130 (5th Cir. 1986); *Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545 (N.D. Tex. 1985); *Meyer Goldberg, Inc. v. Fisher Foods*, 823 F.2d 159 (6th Cir. 1987); *In Re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 1295 (7th Cir. 1980); *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964); *Wyeth Laboratories v. United States District Court*, 851 F.2d 321, 323 (10th Cir. 1988); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985).

such as that granted by the court below. *Wilk v. American Medical Association*, 635 F.2d 1295, 1299 (7th Cir. 1980). In granting intervention and allowing access to discovery, the court spoke to the efficacy of sharing discovery: "When litigants seek to use discovery in aid of collateral litigation on similar issues, . . . access . . . materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process . . . we are impressed with the wastefulness of requiring the [intervenor] to duplicate discovery already made." *Id.*

This Court has also recently recognized the efficacy of sharing discovery. *Wyeth Laboratories v. United States District Court*, 851 F.2d 321, 323 (10th Cir. 1988). Although this Court was constrained to reverse the trial court's establishment of a discovery library for lack of jurisdiction, *id.* at 324, the Court affirmed the principle that discovery sharing best serves the interests of the judiciary and litigants:

> The time and effort spent in future litigation could be reduced by eliminating the need for others to conduct discovery to obtain material that has already been disclosed. The time needed to prepare for future trials would be greatly reduced by the availability of the material the court would include in the library. The time saved by lawyers would naturally translate into cost savings for clients. The court's effort is laudable and just.

Id. at 323–34. For the very same reasons of judicial economy and savings to the parties, the trial court properly relied upon the policy of discovery sharing embraced by this Court in *Wyeth Laboratories* to grant intervention and access to common discovery.

C. The Trial Court Properly Ruled That Intervention is the Appropriate Mechanism to Further Discovery Sharing.

To further the goal of expeditious litigation, the Federal Rules provide that similarly-situated litigants can intervene

into existing litigation, so that all interests can be adjudicated in one action. Fed. R. Civ. P. 24. Courts have long recognized the value of intervention to gain access to discovery. In *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964), plaintiffs in another action intervened in a previously settled matter to obtain access to discovery. They intervened without objection and were successful in obtaining the documents. *Id.* at 265–66. Indeed, that court expressly ruled that the fact that the intervenor could obtain the same information through discovery in its own case was immaterial. *Id.* at 266.

Courts have subsequently built upon this precedent and held that intervention is the appropriate mechanism to modify a protective order to acquire discovery from other litigation. *Martindell v. International Telephone & Telegraph*, 594 F.2d 291, 294 (2nd Cir. 1979) ("[t]he proper procedure . . . was . . . to seek permissive intervention in the private action pursuant to Rule 24(b) for the purpose of obtaining vacation or modification of the protective order"); *Puerto Rico Aqueduct and Sewer Authority v. Clow Corp.*, 111 F.R.D. 65, 67 (D.P.R. 1986) ("[i]ndeed the proper way for a third party to challenge a protective order [to obtain discovery] is to intervene in the main action pursuant to Fed. R. Civ. P. 24(b) for the limited purpose of seeking modification of the protective order").

D. Because Intervention Opinions Not Related to Discovery Are Irrelevant, Issues of Timeliness and Interest Relating to the Property are not Reasons for Denying Intervention; Appellants' Reliance Thereon is Misplaced.

The Appellants disregard the substantial line of precedent allowing intervention for discovery sharing and rely only on opinions which they concede are not analogous. Brief in Chief at 17. *Cf. Sanguine, Ltd. v. United States Department of Interior*, 736 F.2d 1416 (10th Cir. 1984) (court granted

intervention of right to contest substantive issue of oil and gas leases thirty days after entry of judgment). Accordingly, the Appellants' reliance on this irrelevant precedent substantially weakens their argument that the Court erred in granting intervention.

1. The Trial Court Correctly Ruled That Timeliness Did Not Prevent It From Granting Intervention.

Appellants' misapplication of the correct standard for granting intervention is best exemplified by their argument that the present intervention was untimely. Appellants' argument misses the fundamental purpose behind the timeliness requirement.[2] Often an intervenor comes into a case because it asserts a stake in the substantive outcome of that case. It is incumbent, therefore, for the intervenor to become part of the litigation as early as possible in order to exercise its rights under federal law to achieve its desired outcome.

Intervenors in this case, however, only sought to intervene for the limited purpose of modifying the protective order and obtaining certain specific discovery; they did not express an interest in the substantive disposition of the *UNC* litigation. Intervenors' sole desired outcome is to modify the protective order and gain access to the relevant documents. The timing of their motion in no way impacts the adjudication of the rights of the *UNC* parties. Appellants can make absolutely no argument why intervention at the present time causes any prejudice that allegedly would not have occurred if non-intervention related litigation was ongoing. In fact,

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[2] The Appellants' assertion that Intervenors knew about the *United Nuclear* litigation for over a year is both factually unsupported by the record and irrelevant. Appellants cannot explain why they have suffered greater prejudice, if any, in 1989 than they would have suffered in 1988. Moreover, Appellants' assertion of the status of discovery in the Intervenors' lawsuits is wholly unsupported by any reference to the record and should be disregarded by this Court. *See Hicks v. Mickelson*, 835 F.2d 721, 724 (8th Cir. 1987) (statements in appellate brief are not substitute for record and should be disregarded by appellate courts).

their position on timeliness completely contradicts their argument that the intervention " 'is not an ingredient of the cause of action and does not require consideration with it.' " Brief in Chief at 7, quoting, *Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 541, 546–47 (1949).

The court in *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989), recognized the distinction between general intervention and limited, discovery-related intervention and granted intervention after the original action had settled. "Because [the intervenor] sought to litigate only the issue of the protective order, and not to reopen the merits, we find that its delayed intervention caused little prejudice to the existing parties . . . ." *Id.* at 786. *See also Olympic Refining v. Carter*, 332 F.2d 160 (9th Cir), *cert. denied*, 379 U.S. 900 (1964) (intervention allowed nearly three years after settlement); *Mokhiber v. Davis*, 537 A.2d 1100 (D.C. 1988) (intervention allowed four years after settlement; under local rules based on federal rules); *Meyer Goldberg, Inc. v. Fisher Foods*, 823 F.2d 159 (6th Cir. 1987) (intervention allowed six months after settlement); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (intervention allowed after settlement).

Even if timeliness was an appropriate question in discovery-related intervention, Appellants have not provided sufficient reason for this Court to reverse the trial court's holding on timeliness as abusive of discretion or clearly erroneous. In *Sanguine*, this Court set out four factors to analyze in determining timeliness:

> [1] length of time since the applicant knew of his interest in the case, [2] prejudice to the existing parties, [3] prejudice to the applicant, and [4] the existence of any unusual circumstances.

736 F.2d at 1418.[3] Appellants are unable to argue that an analysis of any of these factors represents an abuse of discretion. As explained above, Appellants present no analysis regarding the first factor.

With regard to the second factor to determine timeliness, Appellants assert that they will suffer prejudice for three reasons: that they originally produced documents under a protective order, that they are being denied the opportunity to review the documents and that they are burdened by the expense of reviewing documents. An analysis of these reasons indicates that they are unpersuasive and that they are unrelated to any alleged prejudice caused by the timing of the intervention.

Appellants argue that they relied on the protective order in producing documents to UNC, but disregard the fact that the Intervenors expressly agreed to be covered by the same protective order, *i.e.*, the *UNC* documents will only be used for the purpose of litigating similar cases against the same defendants. Doc. 142 at 2. The trial court, in rejecting Appellants' argument on this point, expressly found that "[Intervenors] have agreed to be bound by the terms of the protective order and seek only limited, relevant information from the file, which defendants would be obligated to duplicate and produce in the pending lawsuits. Defendants will not lose the benefits of the settlement for which they bargained." Doc. 158 at 5.

The Appellants further argue that they are prejudiced by both (1) not being allowed to review the documents before production to Intervenors and (2) by bearing the expense of the review. Brief in Chief at 21. Not only are these arguments factually inconsistent, they misrepresent the status of

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[3] The *Sanguine* analysis is the incorrect standard because it involved intervention of right and not permissive intervention as relied upon by the Intervenors and the trial court. Accordingly, Appellant's arguments in reliance on *Sanguine* should be disregarded. Intervenors respond to these misplaced arguments only in case this Court finds the *Sanguine* analysis helpful.

the litigation. First, Appellants have had ample opportunity to review the documents produced to the Intervenors. In fact, the Intervenors have been forced to move to compel production of the documents from the Appellants. Doc. 168.[1] The Appellants also ignore the essential value of discovery sharing. Obtaining discovery from this litigation would substantially lessen their expense in producing this discovery in the pending matters.

Appellants' citation to authority on this position is likewise unpersuasive. The court in *Forest Oil Corp., v. Tenneco, Inc.*, 109 F.R.D. 321, 322 n.2 (S.D. Miss. 1985), specifically recognized that "[t]he clear majority of courts utilizing the test for modification of protective orders set out in *Wilk* have allowed liberal modification." Moreover, the quoted provision from *Wilk* indicated that "the district court has broad discretion in judging whether . . . injury outweighs the benefits of any possible modification of the protective order." *Id.* at 322 (quoting *Wilk v. American Medical Association*, 635 F.2d 1295, 1299 (7th Cir. 1980)). While the *Forest Oil* opinion may indicate why one district court weighed the costs and benefits of modification differently than the lower court here, such weighing is necessarily based on the facts and circumstances before each court in each particular case. The *Forest Oil* case reaffirms the case-by-case nature of this question and gives this Court no basis in law to find that the lower court abused its discretion in making its decision on the facts and circumstances of *this* case. Finally, Appellants' citation to *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335 (3rd Cir. 1987) is frivolous. The *Cippollone* defendants argued that they were prejudiced by the modification of a protective order; however, the court specifically rejected that argument and approved the discovery sharing. *Id.* at 344–45.

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[1] The pending motion to compel is before the trial court based on its denial of a motion to quash the deposition subpoena (Doc. 163) and this Court's subsequent denial of Appellants' Emergency Application for a Stay, based on a finding of no likelihood of success on appeal. Order of September 14, 1989.

The third factor to determine timeliness is whether the Intervenors will suffer prejudice if the intervention is denied. Appellants assert that Intervenors would have suffered no prejudice if the intervention had been denied. Their argument, however, wholly disregards the fact that this Court's review is limited only to whether the trial court abused its discretion in specifically holding that "[Intervenors] have a legitimate interest in seeking modification of the protective order." Doc. 158 at 4–5. Appellants' misunderstanding of appellate review is especially egregious in light of the fact that the trial court must have accepted Intervenors' argument that "[d]enial of the motion to intervene will substantially prejudice [Intervenors]." Doc. 156 at 5.

Appellants' arguments concerning the fourth factor from *Sanguine*, the existence of unusual circumstances, is likewise inappropriate. Appellants argue that the only unusual circumstance is that Intervenors have no interest in the outcome of the *UNC* litigation. Brief in Chief at 23. Appellants, however, fail to indicate what this point has to do with timeliness or why this Court should upset the trial court holding that the Intervenors "have a legitimate interest in the modification of the protective order." Doc 158 at 4–5.

Appellants make the additional argument that the trial court applied the wrong standard and looked only to the prejudice to the litigation. Brief in Chief at 19–20. First, Appellants fail to cite any authority for their general reference to "those cases in which intervention was sought for an ancillary purpose," *id.* at 20, and their apparent reliance on impact on the parties. More importantly, the district court properly and expressly considered prejudice to the parties. "I must consider whether the opposing party will suffer undue prejudice or delay." Doc. 158 at 4. In fact, in the very next sentence after the sentence quoted by Appellants, the Court stated, "[Appellants] have not shown that they will suffer greater prejudice, if any, now than they would have suffered at any time in the past." *Id.*

Appellants have failed to meet their high burden in persuading this Court that the trial court's holding on timeliness is an abuse of discretion. Not only is timeliness irrelevant to the present type of intervention, but an analysis of timeliness indicates that the court did not abuse its discretion.

2. Interest Relating To The Property is An Inappropriate Factor In Discovery-related Intervention.

Appellants argue that Intervenors should have an interest relating to the property or transaction which was the subject of the principal suit, again citing *Sanguine*. Brief in Chief at 18. This consideration misstates the relevant legal principal and, more importantly, demonstrates why the *Sanguine* opinion is irrelevant to the present analysis. First, as the Appellants readily concede, *Sanguine* concerned intervention of right. Brief in Chief at 17–18. Intervenors here sought to become part of this case through permissive intervention. Doc. 142.

Second, the relevant question is not whether the Intervenors have an interest in UNC's insurance policies but whether this intervention and subsequent discovery sharing would substantially assist the judiciary by decreasing discovery disputes. The trial court ruled that this standard has been met, Doc. 158 at 4, and the Appellants give no reason other than their strident, but generalized dissatisfaction, for this Court to find that ruling to have been clearly erroneous or an abuse of discretion.

The Appellants assert that each of the relevant insurance policies is site-specific. Brief in Chief at 22. They do so, however, with absolutely no reference to the record as required by Federal Rule of Appellate Procedure 10(b) (2). In fact, no such evidence exists in the record. The Appellants are also completely unable to explain how this Court can overrule the trial court's evidentiary finding "that the interpretation of EIL policies issued by or through [Appellants], which

was the subject of the UNC case, is common to [Intervenors'] pending litigation." Doc. 158 at 4.

The Appellants finally argue that discovery sharing only occurs in products liability or mass tort cases and that it should only be used in litigation where the defendant has substantially more resources than the plaintiff. Brief in Chief at 23–24. These arguments are incorrect. First, Appellants' assertions about the types of cases in which discovery sharing have occurred are wholly unsupported by citation to legal authority. Second, much of the discovery sharing approved by federal appellate courts has arisen in commercial litigation. *See, e.g., Meyer Goldberg, Inc. v. Fisher Foods*, 823 F.2d 159 (6th Cir. 1987) (antitrust litigation); *In the Matter of Film Recovery Systems, Inc.*, 804 F.2d 386 (7th Cir. 1986) (hazardous waste clean-up). Moreover, Appellants are unable to provide a single reason why discovery sharing is inappropriate in the commercial context. Finally, the relative wealth of the litigants is irrelevant to this analysis. The appropriate analysis demonstrates that the true cost advantage is to the judiciary.

POINT III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING THAT INTERVENORS HAD STANDING TO SEEK A MODIFICATION OF THE PROTECTIVE ORDER.

A. Applicable Standard of Review.

As Appellants concede, the standard for appellate review of an order granting intervention is whether the trial court abused its discretion. *Sanguine, Ltd. v. United States Department of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984); *See* Brief in Chief at 11.

B. After the Trial Court Granted the Motion to Intervene, Intervenors Had Standing to Seek the Modification of the Protective Order.

Appellants again ignore the substantial body of relevant opinions in which a similarly situated litigant intervenes into a pending or settled matter, and thus attains party status, and obtains discovery through a modification of a protective order. By relying instead on an opinion in which intervention was not sought, Appellants mistakenly argue that Intervenors do not have standing to modify the protective order.

The Appellants have completely misidentified the relevant issue when they characterize it as "whether a non-party should be granted access to discovery documents in a concluded litigation covered by a protective order." Brief in Chief at 12. Intervenors are not non-parties. Appellant's misunderstanding stems from their misplaced reliance on *Oklahoma Hospital Association v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir.) *cert. denied*, 473 U.S. 905 (1985) which they concede does not involve intervention. Brief in Chief at 12.

In *Oklahoma Publishing*, appellant was not a party to the litigation and did not move to intervene; instead, it based its claim for standing on its first amendment right to gather information. *Oklahoma Publishing*, 748 F.2d at 1423. The Supreme Court, however, has consistently recognized that the first amendment does not grant unlimited right for news organizations to gather information. *Id.* at 1425 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)). Moreover, the *Oklahoma Publishing* court recognized that even if the trial court had modified the protective order, that would not have guaranteed that Oklahoma Publishing would have had access to the documents because it had no reason to believe that the parties would disseminate the documents. *Id.* at 1425.

The present case differs in several significant ways from *Oklahoma Publishing*. First, unlike the Oklahoma Publishing Company, Intervenors are parties to this litigation. Once the

trial court granted the motion to intervene, Intervenors became "full participant[s] in the lawsuit and [were] treated just as if [they] were . . . original part[ies]." *Schneider v. Dumbarton Developer, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *State of Idaho v. Freeman*, 507 F. Supp. 706, 712 (D. Idaho 1981). Accordingly, once they had intervened, the Intervenors had full standing to move to modify the protective Order. *Cf. Freeman*, 507 F. Supp at 712.

Second, Intervenors have never intended to disseminate the documents. From the beginning of their involvement with this matter, they have promised to comply with the modified protective order and to use the information only in their pending cases. Doc. 142 at 2.[5] This matter, therefore, is wholly different from *Oklahoma Publishing*. The more persuasive and analogous precedents are cases in which a party was allowed to intervene because of its need for discovery. *See, e.g., Meyer Goldberg, Inc. v. Fischer Foods*, 823 F.2d 159 (6th Cir. 1987).

Finally, the present case substantially differs from *Oklahoma Publishing* in that modification of the protective order has allowed Intervenors access to discovery. After the Court granted intervention and modified the protective order, the Intervenors served a subpoena duces tecum upon Richard Mackenzie, counsel for UNC and custodian of the documents. Doc. 159. The Appellants concede that Mackenzie had access to the documents and made some available. Brief in Chief at 15. The Appellants withheld other documents, which are the subject of a pending motion to compel. Doc. 168. Accordingly, the holding in *Oklahoma Publishing* that modifying the protective order would not necessarily redress

[5] Despite the clear ruling that Intervenors would be given access to the UNC documents for use in their own litigation, Appellants have taken the insupportable position that the Intervenors may not share the documents to the courts or parties in those cases. In a wholly improper attempt to supplement the record, Appellants have gratuitously attached a transcript from a conference in the case brought by Intervenor Rohm and Haas. Intervenors' motion to strike this transcript, *inter alia*, is filed herewith.

Oklahoma Publishing's injury is not applicable here. Appellants' reference to ownership of the documents and an alleged state court filing are not only irrelevant, their failure and, in fact, inability to cite to any record evidence for these factual allegations prohibits this Court's reliance on such assertions on appeal.

POINT IV. THE TRIAL COURT PROPERLY EXERCISED DISCRETION IN ALLOWING INTERVENTION AND MODIFICATION OF THE PROTECTIVE ORDER NOTWITHSTANDING THE PROTECTIVE ORDER OR THE SETTLEMENT AGREEMENT.

A. Applicable Standard of Review.

The trial court has broad discretion concerning protective orders and this Court will disturb a trial court ruling on a protective order only if there has been an abuse of discretion. *In Re Standard Metals Corp.*, 817 F.2d 625, 628 (10th Cir. 1987). An abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling. *In Re Coordinated Pretrial Proceedings*, 669 F.2d 620, 623 (10th Cir. 1982). A reviewing court should not substitute its judgment for that of a trial court. *Id.*

B. The Existence of a Protective Order Does Not Provide a Reason Why the Court Could Not Modify the Protective Order.

Appellants argue that the trial court erred in modifying the protective order because a protective order was in place. *See* Brief in Chief at 25. This argument is clearly illogical because the existence of a protective order is a condition precedent to a modification of a protective order. A court, has the inherent power to modify its own order for good

cause — a showing which the trial court herein found Intervenors had satisfactorily made after weighing the appropriate factors.

The opinions cited by the Appellants do not further their argument. The Appellants incorrectly rely on *Martindell v. ITT Corp.*, 594 F.2d 291 (2d Cir. 1979) and *Minpeco v. Conticommodity Services, Inc.*, 832 F.2d 739 (2d Cir. 1987). *Martindell* and *Minpeco* involved the government intervening into private litigation to obtain the fruits of discovery. 594 F.2d at 292; 832 F.2d at 740. Courts have consistently distinguished these opinions from cases concerning the intervention by private litigants because the government already enjoys an overwhelming investigatory advantage. *See, e.g., Wilk v. American Medical Association*, 635 F.2d 1295, 1300 (7th Cir. 1980) ("When the investigator is the government, there is also a unique danger of oppression") (footnotes omitted). In fact, the First Circuit recently rejected the "compelling need or overwhelming circumstances" test applied in the cases upon which Appellants rely on precisely this basis. In *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 791 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989), the court specifically stated "[o]utside the area of government intervention, courts have applied much more lenient standards for modification."

FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982) is likewise unpersuasive because the intervenors had argued that a court's ability to withhold federal agency documents from the public was restricted only to those reasons listed in the Freedom of Information Act. *Id.* at 232. The court rejected that argument and held that the FOIA does not apply to courts or confidentiality orders entered by courts. *Id.* The *FDIC* intervenors never argued that they should have access to discovery to expedite pending litigation and never agreed to be covered by a modified protective order, as the present Intervenors have done. Because of the significant differences

between these factual situations, *FDIC* does not apply to the present case.

C. The Existence of a Settlement Agreement Does Not Indicate That the Court Abused Its Discretion in Granting Intervention and Modification of the Protective Order.

The existence of a settlement agreement or a protective order provision in the settlement agreement does not give this Court cause to overrule the broad discretion of the trial court. First, Appellants' assertion of the materiality of the confidentiality provision is unsupported by the record. Second, notwithstanding the existence of the settlement agreement, the court ruled that the Appellants would have to produce the documents anyway. Third, the legal authority cited by Appellants does not support their conclusion.

First, Appellants are unable to cite to a reference in the record that confidentiality was a material term in their settlement agreement. Moreover, they fail to state that the same judge both approved the settlement agreement and granted the modification of the protective order. The trial court was aware of the terms of the settlement agreement and found that the intervention would not affect it. Doc. 158 at 5.

Second, Appellants' argument that they will be prejudiced because sealing the court file was part of their settlement disregards the trial court's specific holding that "[Appellants] would be obligated to duplicate and produce [relevant information from the file] in the pending lawsuits." Doc. 158 at 5. If Appellants must produce the same documents to Intervenors eventually, their settlement agreement provides them no protection and the present intervention is a more efficient mechanism for the documents to be produced.

Third, the opinions cited by Appellants do not hold that a trial court cannot modify a protective order to allow an intervenor access to protected discovery simply because a settlement

agreement refers to the protective order. In both *In Re Franklin National Bank Securities Litigation*, 92 F.R.D. 468 (E.D.N.Y. 1981), *aff'd sub nom. FDIC v. Ernst & Ernst*, 677 F.2d 23 (2d Cir. 1982) and *Palmieri v. State of New York*, 779 F.2d 861 (2d Cir. 1985), the intervenors sought the exact terms of the settlement agreement. The courts relied on the special confidentiality of settlement agreements to deny the relief sought. 92 F.R.D. at 472; 779 F.2d at 865. Intervenors here did not request the terms of the settlement agreement, only discovery documents produced pursuant to protective orders that were later referred to in a settlement agreement. The court in *In Re Agent Orange Product Liability Litigation*, 99 F.R.D. 645, 650 (E.D.N.Y. 1983), *aff'd*, 821 F.2d 139 (2d Cir. 1987), distinguished *FDIC* on this same basis. The Second Circuit specifically held that the trial court had not abused its discretion in unsealing the discovery materials despite the existence of a settlement agreement. 821 F.2d at 145. This Court should do the same here.

III. CONCLUSION

For all of these reasons this Court should dismiss this appeal for lack of jurisdiction, or in the alternative, should affirm the trial court in all respects.

INTERVENORS-APPELLEES' STATEMENT REGARDING ORAL ARGUMENT

Intervenors-Appellees concur in Appellant's request for oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Philip B. Davis, attorney for intervenors-appellees, hereby certify that on December 19, 1989, I mailed a copy of Intervenor Appellees' Response Brief to all Counsel of Record.

Dated: December 19, 1989

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